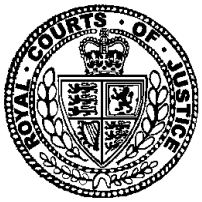

Neutral Citation Number: [2020] EWHC 2952 (Comm)

Case No: CL-2015-000856

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before :

Nicholas Vineall QC sitting as a Deputy High Court Judge

- -

Between :

MEDSTED ASSOCIATES LIMITED	**Claimant**
- and -	
CANACCORD GENUITY WEALTH (INTERNATIONAL) LIMITED	**Defendant**

- -
- -

Henry Byam-Cook QC and Belinda McRae (instructed by **Memery Crystal LLP**) for the **Claimant**
Hodge Malek QC, James Potts and Rupert Coe (instructed by **Devonshires Solicitors LLP**) for the **Defendant**

Hearing dates: 5,6,7,8 October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR NICHOLAS VINEALL QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 06 November 2020 at 10.30 a.m.

NICHOLAS VINEALL QC

INTRODUCTION

1. This trial is an assessment of the damages (if any) payable by the Defendant to the Claimant. The essence of the claim is that the Claimant introduced clients to the Defendant on terms that, if the Defendant did business with them, it would pay the Claimant, but the Defendant in fact did business with those introduced clients without disclosing that to the Claimant, and without making the promised payments.

2. The Claimant, Medsted, is a BVI company which carried on business as an introducing broker. In 2009 Medsted was beneficially owned by Mr Vasileios Valasakis (as to 65%) and Mr Marios Dedetsinas (as to 35%). Both of them are Greek. Medsted, sometimes through sub-brokers, had contacts with a small number of wealthy Greek individuals who wished to trade in CFDs. Amongst them were Mr Alexis Komninos and Mr Ioannis Panagiotopoulos.

3. The Defendant, before it changed its name, was known as Collins Stewart. It is a Guernsey company and it carried out business as a regulated investment institution. In 2008 Collins Stewart was able to provide non-institutional investors with access to major financial institutions, known as first-tier providers, who wrote contracts for differences ("CFDs"). CFDs allow investors to speculate on the stock price of underlying stock, and can also be used to provide liquidity to individuals who have large holdings of relatively illiquid stocks.

4. In May 2009 Medsted and Collins Stewart entered into an agreement under which Medsted would introduce to Collins Stewart individuals who wanted to use the services of Collins Stewart for the purpose of trading in CFDs. The individuals and entities so introduced are referred to as the "Introduced Clients". In return Collins Stewart agreed that it would make payments to Medsted whenever Introduced Clients traded in CFDs. Once clients were introduced, Collins Stewart entered into individual agreements with each client under which it charged the clients a sum that would cover what would fall due to Medsted, plus the sums that would fall due to the CFD provider, plus an element of profit for Collins Stewart. The charging structure followed the standard way in which CFD trades are charged, so that the charges were of two types: commission, charged as a one-off charge first on the purchase, and then again on the sale, of each CFD, and secondly a financing charge, expressed as an annual percentage finance charge but levied on a daily basis for as long as the CFD was open. The rates initially charged by Collins Stewart to the clients introduced by Medsted were 0.7% commission and a 6.2% financing charge. Collins Stewart agreed to pay Medsted 0.25% commission and 4.5% on financing. The Introduced Clients knew what they were being charged by Collins Stewart but did not know how much of that money was going to Medsted.

5. In 2015 Medsted sued Collins Stewart alleging that, from some time in 2010, Collins Stewart had begun to carry out deals for the Introduced Clients without disclosing the trading to Medsted: in essence, that it had cut Medsted out of the deal. Collins Stewart's eventual response was, in outline, that it had indeed carried out trading on behalf of the Introduced Clients, and had hidden that trading from Medsted, but that it did so only after the clients concerned had discovered the level of the fees being paid

by Collins Stewart to Medsted and indicated that they were not prepared to continue to trade on the terms they had originally agreed with Collins Stewart.

6. Medsted claimed against Collins Stewart in debt, damages, and restitution.

7. Just a month before the trial was due to begin, an order was made removing quantum issues. Mr Justice Blair's order carefully and precisely identified what would be decided and what would await a second stage:

> The trial listed to commence on 7 June 2017 will determine the liability issues on the claimant's claims for: (i) the taking of an account and an order for the payment by the defendant of the amounts found due to the claimant on the taking of such account; (ii) damages to be assessed; or (iii) a restitutionary award/quantum meruit to be assessed. The taking of the account, the assessment of damages or the assessment of a restitutionary/quantum meruit will follow as a second stage, depending on the Court's findings at the trial.

8. There was a six day trial of liability issues before Mr Justice Teare in June and July 2017. Teare J made a series of findings of contested fact, and resolved the ten issues which the parties had identified for resolution.

9. The Judge made some findings of fact about the events leading to the end of the relationship between Medsted and Collins Stewart. They are important to the determination of quantum and so I set them out in full. In order to make the passage understandable when taken in isolation, I have added some explanatory material in square brackets.

> **2010 — The events leading to the end of the business relationship**
>
> 45. On 5 February 2010 Zoe Smart of Collins Stewart sent to Mr. [Vasileios] Valasakis a "position Statement" from Commerzbank [one of the first-tier providers used by Collins Stewart]. It was copied to Mr. Alexis Komninos. One of the columns in the statement was headed "Funding" and listed certain figures from which it was possible (I was told) to calculate the commission rate charged by Commerzbank. Very shortly afterwards Marios [Dedetsinos] emailed Mr. Jouan [a stockbroker at Collins Stewart] instructing him not to send a statement to Mr. Komninos or any other client. He explained that he did not want the clients to know what the first-tier provider was charging. On the same day Mr. Valasakis also emailed Zoe Smart [of Collins Stewart] saying that she should be careful not to send Mr. Komninos any statements which showed Collins Stewart's charges.
>
> 46. At about this time Mr. Jouan and Mr. Glover [another Collins Stewart stockbroker] decided to visit Athens again. On 3 March 2010 Mr. Jouan spoke to Mr. Komninos by telephone

about the proposed trip. Mr. Jouan asked Mr. Komninos whether Mr. Komninos was "going to include Marios and Vasileios". He suggested to Mr. Komninos that they did not need to be invited or involved. Mr. Komninos agreed and asked that any business they did should "stay between you and me". Mr. Jouan agreed and said that Mr. Valasakis and Marios would not "know a thing". The transcript of the call suggests that they had in mind business involving Ioannis Panagiotopoulos, another of the clients who appears to have been introduced by Mr. Komninos (and referred to in the case as "Ioannis").

47. The visit to Athens took place between 8 and 11 March 2010 when Mr. Glover and Mr. Jouan met clients with Mr. Valasakis and Marios. There was no evidence of any meetings at which Mr. Valasakis and Marios were absent though Mr. Glover and Mr. Jouan did cancel dinner with them on the first day.

48. On 15 April 2010 there was a telephone call between Mr. Jouan and Mr. Komninos lasting almost half an hour (26 minutes and 4 seconds). Mr. Jouan called Mr. Komninos and said that he had been speaking with Ioannis who asked him about the level of charges. Mr. Komninos said that Ioannis had spoken to him on the same subject. Both Mr. Jouan and Mr. Komninos appreciated they were in a difficult position. They did not want to lose the business of Ioannis ("he's a very good client"). Mr. Jouan suggested that new accounts be opened with other company names which would be kept separately. Mr. Komninos would be the introducer and Mr. Valasakis and Marios would never know about it. Mr. Jouan said he did not want to go behind them "but we're not, it feels like we're not going behind their backs because these guys won't pay the rates that they want to pay. So it's not as though, it's not as though they're missing out on the accounts because these guys won't pay the rates anyway." Mr. Komninos said he would speak to Ioannis and shortly afterwards Ioannis telephoned Mr. Jouan. He said that he was really upset with Marios about the amount he was being charged. Mr. Jouan said that Collins Stewart were charging what they had been told to charge. The conversation ended with Ioannis agreeing to open an account with Collins Stewart. Mr. Jouan then had another long call with Mr. Komninos (almost 20 minutes). Mr. Jouan said that he had "sorted everything out". Mr. Komninos said that he had sought to persuade Medsted to reduce their charges but they had refused and had blamed Collins Stewart. They discussed the new arrangements (which were to be beneficial both to Mr. Komninos and Collins Stewart) and Mr. Komninos repeated that Marios and Mr. Valasakis should not find out about the new arrangements.

49. On 21 April 2010 Mr. Valasakis asked Mr. Glover by email whether Mr. Lovett had approved the IB and NCA agreements. On 27 April 2010 Mr. Glover replied saying that "as previously advised we are unable to sign the agreements in their current format." That was probably a reference to what had been said in Athens. Mr. Glover referred to Collins Stewart's terms which had been given to Mr. Valasakis and asked for Mr. Valasakis' comments.

50. On 28 April 2010 Mr. Jouan was involved in arranging an IB agreement, not with Medsted, but with Mr. Komninos who, Mr. Jouan said in an internal email, "will be introducing plenty of business to us once the agreement is signed."

51. On 29 April 2010 Mr. Valasakis emailed Mr. Glover, it would appear in reply to Mr. Glover's email of 27 April 2009, saying that Medsted will sign Collins Stewart's form of agreement subject to one correction. He added that "it is the NC that needs to be signed together with your IA agreement for the obvious reasons we discussed in Athens. Any suggestions ?"

52. It appears that Marios signed a copy of Collins Stewart's terms on 30 April 2010 (with manuscript amendments to two clauses, clause 4 and 6.1.) It was kept on Medsted's files. It was not sent to Collins Stewart (as recorded by a manuscript note which states that Collins Stewart have no record of it being “produced or received”).

53. Mr. Komninos then started to introduce clients to Collins Stewart who opened accounts with them. Collins Stewart also opened new accounts for Mr. Komninos and for Ioannis. Medsted was not informed of these accounts. Hiding Mr. Komninos' new account from Marios required Mr. Jouan to delete a reference to it in a schedule sent to Marios on 2 June 2010, saying that he had "crossed off a new CFD account internally at Collins Stewart." On the same day Mr. Jouan told Marios that "Alex [Mr.Komninos] has gone very quiet …do you think he is doing something elsewhere or just sitting back for the minute." When cross-examined he accepted that this was dishonest.

54. On 11 June 2010 the first-tier provider, Crédit Agricole Cheuvreux, informed Collins Stewart that the portfolio was one of high risk and that the margin should increase from the current 20% to 50%. Mr. Jouan passed on that information to Mr. Komninos on the same day but he did not pass it on to Medsted.

55. On 16 June 2010 Marios asked Mr. Jouan by email whether Mr. Komninos had opened another account with Crédit

Agricole. Mr. Jouan replied "No. Do you think he has gone direct to them?" Mr. Jouan, when cross-examined, accepted that this was a lie though in his witness statement he had said that his reply to Marios was truthful. Mr. Jouan spoke to Mr. Komninos and told him that he, Mr. Jouan, had been asked whether Mr. Komninos had an account and that he had replied that he did not. Mr. Komninos said that Medsted had thought they could "trick me and the other people forever."

56. On 22 June 2010 Mr. Jouan emailed Marios saying that Cheuvreux had raised their CFD positions "overnight" to 50%. He set out the amount of margin required, over £1m, but omitted reference to any of the new accounts. Marios responded that day in relation to each account saying that positions would be reduced in consequence. Also that day Collins Stewart paid the required sums to Cheuvreux.

57. There was then a telephone call between Mr. Lovett, Mr. Jouan, Mr. Glover, Mr.Valasakis and Marios. Mr. Lovett made reference to the increase in margin from 20% to 50% which, he said, presented problems. He referred to the need for cash at short notice, something to which he had referred "when we first started the relationship". As a result of pressure on Collins Stewart he said that he wished to terminate the relationship. He accepted that this was "not your doing" and "it's not our doing…it's just the way the market is." Mr. Lovett said the relationship could continue for 3 months so that Medsted could find "homes for clients." Mr. Valasakis responded by suggesting that "legally we keep our relationship. We terminate the clients but we keep our legal relationship…because down the road you never know". He then mentioned the agreement which Marios had signed and which was sent back to Collins Stewart. (The latter part of that statement appears to be wrong because no such agreement was found at Collins Stewart.). Mr. Glover commented that "that's in place, we can leave that in place. Yes absolutely."

58. Medsted continued to invoice Collins Stewart in respect of trades on accounts introduced by Medsted and of which they were aware. The last payment was made in August 2011. The total sum paid by Collins Stewart to Medsted between May 2009 and July 2011 was €942,294. Medsted's claim in this action is for an account of the sums of further commission to which it would, on its case, have been entitled in respect of the business which Collins Stewart did with Mr. Komninos and Ioannis (and others) but which had not been disclosed to Medsted.

10. The precise ambit and effect of what Mr Justice Teare decided on the critical issues before him is a matter of dispute between the parties, but for the purposes of this introduction I can summarise as follows.

    i) As to the nature and terms of the contract, the Judge decided that the contractual relationship between Medsted and Collins Stewart was governed by the terms of Medsted's document dated 15 May 2009 (#60-78), and that insofar as specific rates of commission or rebate had not been agreed reasonable rates were to be implied (#79-80). He held that the contract imposed an obligation on Collins Stewart to disclose on a regular basis all trading information of the Introduced Clients so that Medsted could calculate the commission and rebate due to it (#81-87).

    ii) Issue 6 was whether or not there was an express or implied term that Medsted would not mislead the Introduced Clients as to the division, as between themselves, the first tier provider and Collins Stewart, of the charges levied by Collins Stewart (I shall refer to that as the "split"). The Judge held that the relationship between Medsted and the Introduced Clients was a fiduciary relationship, and he held that Medsted's failure to disclose the split was a breach of Medsted's fiduciary duty to the Introduced Clients. But he rejected the contention that a term to that effect should be implied into the Medsted-Collins Stewart contract.

    iii) Under Issue 8 the Judge determined the identity, and beneficial ownership of the Introduced Clients.

    iv) Issue 9 was whether Medsted was entitled to an account of the commission and funding rebate payable to Medsted by Collins Stewart as a debt in respect of the hidden trading done by the Introduced Clients. He held that there was no claim in debt.

    v) Issue 10 was whether Collins Stewart had acted in breach of contract by trading secretly with the Introduced Clients and if so whether Medsted was entitled to an order for damages to be assessed. The Judge held that Collins Stewart was in breach of contract because it had failed to disclose to Medsted on an ongoing basis the trading carried out by Introduced Clients. He held that Medsted had suffered loss when trades were done "behind its back". However, on the basis that Medsted was in a fiduciary relationship with the Introduced Clients, and was in breach of that fiduciary duty because it had failed to disclose to the Introduced Clients the level of the remuneration that Medsted was entitled to receive from Collins Stewart, he held that if he were to award damages to Medsted that would amount to Medsted profiting from its own breach of fiduciary duty. He held that it would be contrary to public policy to assist Medsted to benefit from its breach of fiduciary duty, and so he held that Medsted was entitled only to nominal damages.

    vi) Under Issue 11 the Judge rejected the claim to a restitutionary award or quantum meruit, on the basis that any such claim as might otherwise arise would be contrary to public policy because of the breach of fiduciary duty.

11. The Judge found as a fact that Medsted had agreed to pay commissions to various sub introducing brokers ("sub-IBs"). At paragraph 136 of his judgment the Judge said this:

> "Had the court granted judgment for substantial damages to be assessed the assessment of Medsted's loss would have to take into account the sums payable to the sub-IBs by Medsted; otherwise the damages would be assessed in a greater sum tha[n] Medsted's actual loss. In circumstances where Medsted paid its sub-IBs "handsomely" the actual loss may in fact have been proved to be quite modest."

12. The Judge's overall conclusion was as follows:

> 138. Medsted's business of introducing clients to Collins Stewart without informing the clients of the charges levied by the first-tier provider and the amount of commission and rebate being charged in addition was in breach of its fiduciary duty to its clients. When the clients learnt of those matters they no longer wished to do business with Collins Stewart on the terms which had been agreed with Medsted. Collins Stewart was anxious to keep the business and succeeded in so doing by devising a scheme where Collins Stewart traded with the clients at reduced rates and without Medsted being informed. That was in breach of Collins Stewart's contract with Medsted which breach was a cause of loss to Medsted. However, since the root of such damage was Medsted's breach of fiduciary duty to its own clients, Medsted is only entitled to nominal damages for such breach. Further, in circumstances where the commission and rebates earned by Collins Stewart when trading directly with the clients did not include any commission or rebate for Medsted there can be no claim in debt by Medsted against Collins Stewart. Finally, if Medsted had a claim in restitution or for a quantum meruit such claim would fail for the same reason that the claim for substantial damages failed.

13. Medsted appealed against the decision to award only nominal damages, and against the decision to dismiss the debt claim, but did not appeal the decision to refuse a restitutionary remedy or quantum meruit. The Court of Appeal (Longmore LJ, with whom Peter Jackson and Asplin LJJ agreed) decided in February 2019 ([2019] EWCA Civ 83) that where a principal (here the Introduced Clients) knows that his agent (Medsted) is receiving commission from a third party (Collins Stewart), the agent would not necessarily be under a fiduciary duty to disclose to the principal the amount of commission that it was receiving, and that on the facts of the instant case Medsted had not been obliged to disclose the level of its remuneration from Collins Stewart. There was therefore no basis for limiting the award to nominal damages. The Court of Appeal held that the Judge had been right to regard Medsted's claim as being in damages and not in debt. Overall, therefore, the appeal was allowed and an order made for damages to be assessed.

14. The parties then exchanged pleadings on quantum.

15. Medsted's Particulars of Claim asserts a claim for damages, in relation to each of the 20 clients introduced by Medsted, in respect of "hidden trading". Hidden trading means business between the Introduced Clients and Collins Stewart which was not disclosed to Medsted and in respect of which Collins Stewart made no payments to Medsted. The essence of Medsted's claim is that, in relation to the hidden trading, it is entitled to the sums of money that it would have received had that same trading taken place but, instead of it being concealed, it had been disclosed and the due payments made. Its primary case is that that remuneration should be calculated on the basis of the agreement between Medsted and Collins Stewart, with a reasonable rate being used only in relation to trading of a type for which no applicable rates had been agreed. In the alternative Medsted says it is entitled to damages calculated by reference to reasonable rates on all types of hidden trading. But Medsted's quantum pleading contained no quantification of its claim. Medsted said that it could not quantify its claim because it had not been given adequate disclosure to enable it to assess the extent of hidden trading.

16. Collins Stewart's responsive pleading is (now) its Re-Amended Defence on Quantum. The main points pleaded by Collins Stewart are as follows:

    i) Medsted's claim is "fundamentally inconsistent" with final and conclusive determinations in the judgment of Teare J;

    ii) It is admitted that Medsted is in principle entitled to damages in respect of loss of a chance of profits, if any, on CFD and non-CFD trading carried out by Collins Stewart with the Introduced Clients, and on which commission was not paid to Medsted at the time;

    iii) Medsted is estopped from advancing a case inconsistent with paragraph 136 of the judgment of Teare J (which I cited above); and in any event Medsted must give credit for any monies that it would have paid out to sub-IBs had it received commission from Collins Stewart; and because Medsted would have paid out most or all of its income to sub-IBs, its recoverable damages are correspondingly reduced or extinguished;

    iv) In assessing the chance that the Introduced Clients would have traded but for Collins Stewart's breaches, a substantial discount should be applied because there is a high probability that the Introduced Clients would have refused to continue to trade through Collins Stewart, at any rate on the terms initially agreed between them and Collins Stewart, which were inflated because of Collins Stewart's agreement to pay large sums to Medsted. In particular Collins Stewart rely on the finding by Teare J that the two most active clients, Mr Komninos and Mr Panagiotopoulos refused to do business at the originally agreed rates;

    v) Hidden trading began only at the end of April 2010, which is when Mr Komninos and Mr Jouan put into effect their plan to trade without involving Medsted;

vi) Annex 1 to the pleading sets out Collins Stewart's case as to trading by Introduced Clients on which commission and rebates were paid to the Claimant (whether before or after hidden trading began). Expressed in sterling the total charges levied on the Introduced Clients, in relation to non-hidden trading by Collins Stewart, was £1.215m, of which £840k was paid to Medsted and £374k retained by Collins Stewart;

vii) Annex 2 sets out Collins Stewart's case as to the extent of CFD trading hidden from Medsted. Expressed in sterling the total charges levied on the Introduced Clients in respect of CFD trading by Collins Stewart, was £1.588m of which £214k was rebated to Mr Komninos, and the balance of £1.373m was retained by Collins Stewart;

I pause to note that, on the basis of these figures, for CFD trading carried out in accordance with Collins Stewart's contractual obligations, that is to say non-hidden trading, Collins Stewart retained about 31% of the charges paid to it by its clients, whereas for hidden trading the proportion retained was 86%.

viii) Annex 3 sets out Collins Stewart's case as to the extent to which it profited from charges levied on Introduced Clients for business other than CFDs. It totals £89k;

ix) Annex 4 sets out Collins Stewart's case as to the sum that Medsted paid out to it sub-brokers from the monies it in fact received from Collins Stewart. Collins Stewart contends that Medsted paid out everything it received from Collins Stewart, leaving nothing in Medsted.

THE HEARING

Factual witnesses

17. As far as factual witness evidence is concerned, no witness evidence was called by Medsted. Mr Hodge Malek QC, counsel for Collins Stewart, reminded me that Mr Justice Teare had decided that Mr Valasakis was secretive and could not be regarded as a reliable witness, although the Judge rejected the suggestion that he was a thoroughly dishonest and evasive witness. Mr Malek was critical of Medsted's decision not to call Mr Valasakis, and gave examples of questions which he would have wished to put to Mr Valasakis had he been called.

18. Collins Stewart called only one factual witness, Mr Lovett, who had also been a witness at the liability trial. Mr Lovett's evidence was mostly concerned with the process by which the Defendant's quantum schedules came to be compiled. On that issue I am entirely satisfied that Mr Lovett was doing his best to give honest evidence to assist the Court, but for reasons which I shall explain later his evidence was not, in practice, of great assistance, for it was limited to a description of a process which he had overseen, but not himself carried out. There is one feature of Mr Lovett's evidence, about the minutes of an internal Collins Stewart credit committee meeting, to which I shall need to return in some detail.

Experts

19. Both parties called experts to give evidence of the range of reasonable rates of commission and rebate for CFD and non-CFD trading. In my view both Mr Wellesley (called by Medsted) and Mr Latchford (called by Collins Stewart) were careful witnesses qualified to give evidence on those issues. In the event, however, the only issue that arises is a very minor issue on reasonable rates for non-CFD trading.

20. Finally Collins Stewart called as an expert Mr Ballamy, a forensic accountant. He was an extremely impressive witness, acutely conscious of the distinction between the matters he had been asked to assume and the matters on which he could properly express an opinion. He gave his evidence with clarity and precision and I have no hesitation in relying on the evidence he gave and the opinions he expressed.

21. Medsted did not call any evidence equivalent to Mr Ballamy's. It was open to Medsted to call a witness to analyse the disclosure given by Collins Stewart in relation to hidden trading, or to opine on the reliability of the schedules produced by Collins Stewart, but it chose not to do so. Instead Mr Byam-Cook QC, for Medsted, cross-examined Mr Lovett and Mr Ballamy on the exercises that had been carried out, and made submissions based on documents from Collins Stewart's disclosure.

22. The hearing was carried out entirely remotely as result of the COVID restrictions presently in place. The parties co-operated well with the Court and with each other to ensure that the trial proceeded smoothly, and I am grateful to Counsel for their comprehensive but clear submissions.

23. After the hearing had ended Mr Ballamy prepared some further calculations, in relation to which the parties made short further written submissions on 20 October.

24. It can be seen that this assessment of damages was therefore rather unusual, in that the Claimant, who has the burden of proof in terms of establishing the damages to which it is entitled, called no witness evidence, and indeed the Claimant provided no quantified figure for its claim until its closing submissions.

ISSUES

25. The parties produced a helpful statement of common ground and issues.

26. The common ground includes the following:

    i) The contract between the Claimant and the Defendant contained the following express terms:

> "Collins Stewart will pay Medsted a commission and funding rebate in relation to CFDs or any other product placed with Collins Stewart by customers introduced by Medsted to Collins Stewart. Such commission and financing payments will be made monthly in arrears and will be payable to Medsted by the 10th day of the month. The following outlines the commercial terms of the agreement: …
>
> • Any off exchange crosses where the client is charged commission the exchange fees and sales taxes will be calculated and split 50/50 between Collins Stewart and Medsted.

> • Collins Stewart and Medsted may agree to give some customers special commission and financing rates; these rates and the splits will be agreed between the two parties and the customer and will become an integral addendum to this agreement."

ii) Collins Stewart was obliged to disclose to Medsted on a regular basis all trading information of the Introduced Clients so that Medsted could calculate the commissions and rebates due to it.

iii) Collins Stewart agreed to pay the Claimant commission and rebate in respect of the CFD trading of the Introduced Clients at a rate of 0.25% commission and 4.5% financing.

iv) Collins Stewart breached the obligation at (ii) above by deliberately failing to inform Medsted of certain trading done by the Introduced Clients behind Medsted's back after 13 May 2009 ("hidden trading"). The precise scope and amount of the hidden trading is in dispute but it is common ground that it involved hidden trading by the Introduced Clients in at least CFDs, FX and equities. Collins Stewart's breach caused the Claimant loss because the Claimant was disabled from exercising its right to commission and rebate on the hidden trading (the basis for assessing that loss is in dispute).

27. The parties identified 11 issues. Some are of major importance, some of much lesser importance, and some fell away in the course of the hearing. I think it is convenient to simplify and reorder the issues to some extent, and in my view the logical order and form of the issues is as follows.

(1) What is the proper basis for the assessment of damages?

Is it, as the Claimant contends, by applying the rates of commission and rebate payable by the Defendant to the Claimant to all the hidden CFD trading of the Introduced Clients; and/or by applying a reasonable rate of commission and rebate to all the hidden CFD and non-CFD trading of the Introduced Clients?

Or is it, as the Defendant contends, either

(i) on the basis of loss of a chance? If so, to what extent (if any) do the Claimant's damages fall to be discounted to reflect the possibility that the Introduced Clients would have refused to continue to trade via the Claimant in any event, further or alternatively at the Claimant's rates? ; or

(ii) Is the Claimant only entitled to its proportionate share of the commissions and finance rebate actually levied by the Defendant on the hidden trading of the Introduced Clients?

(2) Credit for payment to sub-IBs

Must Medsted give credit against its damage claim for sum that it would have paid to the sub-IBs, either because that issue has been determined by Teare J at paragraphs 128 and 136 of his judgment, or because such a credit must as a matter of law be given? If so what is the appropriate amount of credit?

(3) What is the true level of hidden trading?

This is the obvious question but it turns out it cannot be answered directly, so this issue has to be recast as "What is the level of payment that would have been payable to Medsted had the hidden trading not been concealed?"

(4) In the light of the answers to issues 1 to 3 what is the appropriate award of damages?

Issue 1: the proper basis of assessment of damages

28. The essential issue here is whether to assess damages on the basis of the sums that would contractually fall due to Medsted on all of the hidden trading, or whether damages should be assessed by reference to whatever level of trading would have taken place had Collins Stewart not concealed its activities from Medsted.

29. Damages for breach of contract are awarded to put the Claimant in the position it would have been in had the contract been performed. The measure of loss is a performance measure. As Lord Reed explained in Morris Garner v One Step (Support) Ltd 2018 UKSC 20:

> 31. … Damages in tort are generally intended to place the claimant as nearly as possible in the same position as he would have been in if the tort had not been committed. The law of contract, on the other hand, gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed.
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> 32. In Robinson v Harman (1848) 1 Exch 850, Parke B said: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." That statement has been endorsed on many occasions at the highest level, most recently in Bunge SA v Nidera NV (formerly Nidera Handelscompagnie BV) [2015] UKSC 43; [2015] Bus LR 987, para 14, where it was described as the "fundamental principle of the common law of damages". It has also been described as the "ruling principle" (Wertheim v Chicoutimi Pulp Co [1911] AC 301, 307), the "fundamental basis" for assessing damages (British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2) [1912] AC 673, 689), and the "lodestar" (Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory) [2007] UKHL 12; [2007] 2 AC 353, para 36).

> 34. The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 848-849. As his Lordship stated, a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to "substituted or secondary obligations" on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law: "The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ..." (p 849)
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> 35. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. Their function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance (subject, according to the decision in Attorney General v Blake, to a discretion to order an account of profits in exceptional circumstances where the other remedies are inadequate). The damages awarded cannot therefore be affected by whether the breach was deliberate or self-interested.

30. These basic principles were not in dispute between the parties. But the difficult question in this case, on which neither party was able to cite relevant authority, is to define the correct counterfactual. What does it mean to say, "had the contract been performed"? What *exactly* is the difference between the imaginary world in which "the contract is performed", and the events which in fact took place?

31. The Claimant's submission is that the only relevant difference is that in the counterfactual world the Defendant discloses to the Claimant, and then pays the agreed rate for, the trading which it in fact carried out with the Introduced Clients. In other words, in the imaginary world in which the contract *is* performed, the trading is done at the same level as it was in fact done in the real world.

32. In contrast the Defendant's submission is that the Introduced Clients would not in fact have done any, or at any rate not so much, trading through Collins Stewart had

Collins Stewart complied with its contract, because compliance by Collins Stewart would have required the clients to pay charges sufficient to cover Medsted's commission rates, which they were unwilling to do. The relevant counterfactual is, says the Defendant "what would have happened, after the Introduced Clients in question had discovered Medsted's split of the charges, if Collins Stewart had, in accordance with the non-circumvention agreement, declined to do business with them directly (ie other than on terms which involved Medsted and the disclosure of all trading to Medsted)."

33. So, the argument goes, in asking what would have happened but for the breach of contract, it is necessary to discount the amount of actual trading done to reflect the high probability that in fact much less trading would have been done if Collins Stewart had behaved honestly and properly, and complied with its contractual obligations to Medsted.

Has the point been decided already?

34. Mr Byam-Cook for Medsted submitted that the framework for assessing damages had already been set by the Judge, in a way which resolved this question, at paragraphs 129 to 132 of his judgment. In this passage the Judge held that Collins Stewart's breach of contract was "a" cause of Medsted's loss. He said this:

> 130. Collins Stewart accepted that it was obliged to disclose to the claimant on a regular basis all trading information of the introduced clients so that the claimant could calculate the commission and rebate due to it. Collins Stewart failed to do that. Mr Jouan expressed his willingness to exclude Medsted and to keep Medsted ignorant of trades involving Ioannis on 3 March 2010 when speaking to Mr Komninos before a trip to Greece. On 15 April 2010 Mr Jouan proposed to Mr Komninos a scheme whereby new accounts could be opened in company names of which Medsted would not be told. Thereafter new accounts were opened for Mr Komninos and Ioannis of which Medsted was not told. Thus it was that in breach of its agreement with Medsted Collins Stewart did not inform Medsted of all the trades done by introduced clients.
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> 131. The crucial question is whether that breach of contract caused Medsted to suffer loss. Mr Darling submitted that it did because if Mr Komninos and Ioannis had not traded with Collins Stewart directly, and behind Medsted's back, the clients would have continued to trade. Mr Malek submitted that no loss was caused by the breach because the cause of the loss was the clients' decision to stop trading with Collins Stewart through Medsted. This submission mirrored Mr Jouan's own justification for his actions when speaking to Mr Komninos on 15 April 2010 ("we're not going behind their backs because these guys won't pay the rates that they want to pay").

> 132. Medsted suffered loss when trades were done "behind its back" with introduced clients; it was disabled from exercising its right to commission and funding rebate on such trades. There were, in my judgment, two causes of that loss. First, there was the decision of Mr Komninos and Ioannis to stop trading with Collins Stewart through Medsted. Second, there was Collins Stewart's willingness to find a means of continuing to do business with Mr Komninos and Ioannis. To achieve that end Mr Jouan, having expressed his willingness on 3 March 2010 to keep Medsted in the dark, proposed on 15 April 2010 the use of corporate identities to ensure that Medsted did not learn of future trades. Thus the actions of Collins Stewart in breach of its agreement with Medsted were a cause of Medsted's loss.

35. In the immediately following passage the Judge then went on to hold, wrongly in the light of the Court of Appeal judgment, that Medsted was not entitled to an order for damages to be assessed because Medsted was in breach of fiduciary duty.

36. In my view the Judge at his #132 has held that, from a factual point of view, there were ultimately two factors which contributed to create the result that Medsted has been deprived of income. The first is that Mr Komninos and Mr Panagiotopoulos decided "to stop trading through Medsted." Since none of the Introduced Clients strictly traded "through" Medsted at all, I agree with Mr Byam-Cook that this is shorthand for "trading on the terms and conditions which Collins Stewart imposed as a result of its agreement with Medsted". The second was that Collins Stewart concealed the Hidden Trading from Medsted.

37. However, I do not think that the Judge has reached any finding on the correct counterfactual to apply when determining the amount of damages to which Medsted is entitled as a result. That would more naturally be a question of the assessment of damages, rather than a trial of liability issues, especially given the terms of Blair J's order; and the Judge's reasoning contains no articulated analysis of the counterfactual enquiry that is required. I therefore reject Mr Byam-Cook's first submission on this point, and I must go and resolve the issue and decide on the appropriate counterfactual.

38. The essential sequence of events here had two stages. First, Mr Komninos and Mr Panagiotopoulos discovered how much Medsted was receiving, compared with the totality of the charges they were paying to Collins Stewart. They were angry. They indicated to Collins Stewart that they were not prepared to go on trading at the rates that they had hitherto been paying to Collins Stewart. Neither party now suggests that the other was at fault for the fact that the clients discovered this fact.

39. The second stage was Collins Stewart's response. Collins Stewart was not obliged to continue to deal with the Introduced Clients. Its only relevant contractual obligation to Medsted was that, if it did deal with them, it had to pay Medsted in accordance with its agreement with Medsted. Collins Stewart therefore had various choices when Mr Komninos and Mr Panagiotopoulos discovered the levels of rebate receivable from Collins Stewart by Medsted. Collins Stewart could have reduced its charges to

whatever level was sufficient to persuade the Introduced Clients to continue to trade, but then continue to pay Medsted at the agreed rates. If to do so would make the overall position unprofitable for Collins Stewart, it was open to Collins Stewart simply to decline to do business with the Introduced Clients. That would not have constituted a breach of Collins Stewart's obligations to Medsted, nor any breach of its obligations to the Introduced Clients. In the event, Collins Stewart took a different course, which did involve a breach of contract. Collins Stewart decided to continue to deal with the Introduced Clients, on much reduced overall rates, but instead of disclosing those trades and making the agreed payment to Medsted, it decided actively to conceal that that trading was taking place. The relevant breach in my view is therefore the failure to disclose the hidden trading, and the obvious concomitant of that is the resulting failure to pay the agreed remuneration to Medsted. Once the introductions are made the Medsted-Collins Stewart contract is akin to a unilateral contract: there is nothing more for Medsted to do, but if Collins Stewart does then trade with the Introduced Clients, Collins Stewart must pay the agreed remuneration to Medsted. On this analysis there is no need to ask whether the Introduced Clients would have continued to trade if Collins Stewart had insisted on maintaining the same terms as between Collins Stewart and its clients. That is simply not a relevant part of the "had the contract been performed" counterfactual, because Collins Stewart was not obliged to (and in the event did not) insist on maintaining the same terms as between it and the Introduced Clients.

40. Mr Malek QC, for Collins Stewart, submitted that the reality of the situation was that it was Medsted who told Collins Stewart what to charge, but I agree with the submission of Mr Byam-Cook for Medsted, that there is no contractual term which permitted Medsted to set the level of Collins Stewart's charges. It seems to me that it was open to Collins Stewart to reduce its charges if it wished to do so.

41. I therefore find that I should assess damages on the basis that the trading which in fact happened did happen, but that (unlike what in fact happened) Collins Stewart would have paid Medsted what it had promised to pay in relation to such trading.

42. I acknowledge that there is some superficial attraction in Mr Malek's point that this result seems harsh on Collins Stewart, because Medsted is likely to end up receiving more money than it would have done if there had been no breach of contract at all by Collins Stewart. But I think there are three answers to that. The first is that contractual damages are not intended to put the Claimant in the position had there been no breach of contract. The second is that Collins Stewart has no-one but itself to blame for the fact that the hidden trading was at the level it was in fact at. The apparent harshness of which it complains is a consequence of its own, deliberate, breach of contract. The third is that trading with the Introduced Clients was not, in and of itself, a breach of contract. On the contrary, it was the mutual intention of the parties that Collins Stewart should trade with the Introduced Clients. Having done so, Collins Stewart should pay what it promised to pay. Collins Stewart's argument really boils down to a plea that, if only we had known that our dishonest behaviour would get found out, we would have behaved differently. That does not strike me as an attractive argument, and in my view the correct approach to contractual damages does not permit Collins Stewart to benefit from that sort of counterfactual argument.

43. I should also deal with Mr Malek's argument that this conclusion means that the measure of damages is the same as the sum that would have been awarded had there been a valid claim in debt, yet the debt claim was dismissed by the Judge and the Court of Appeal upheld that part of the Judge's decision. Assuming that all of those points were true, it does not seem to me that it would assist Mr Malek. There is no rule of law which says that just because in a particular case a claim in debt does not lie, the assessment of damages cannot reach the same figure as would have been payable had there been a claim in debt. In any event, as I explain below, I have decided that Collins Stewart is entitled to one element of credit against Medsted's damages claim, and this element of credit would not have been due had this been a debt claim, so Mr Malek's premise, that the award is the same as the award in debt would have been, is false.

In case I am wrong

44. If I am wrong on the correct counterfactual, it would be necessary to make an assessment of what proportion of Collins Stewart's hidden trading actually done with the Introduced Clients would have been done with them had Collins Stewart been open with Medsted throughout and had Collins Stewart insisted on charging the Introduced Clients the rates it charged on the non-hidden trading unless and until Medsted agreed to accept a lesser level of remuneration. This depends on a range of contingencies: how far would Collins Stewart have been prepared to reduce its own profit levels; how far would Mr Valasakis have been prepared to reduce the remuneration received by Medsted; and how willing would the "angry" Mr Komninos and Mr Ioannis have been to continue to deal with Collins Stewart at all, if that led to money being made by Medsted. There was no evidence at this hearing from Mr Valasakis, nor at any stage from any of the Introduced Clients. There was some evidence about CFD trading done by the Introduced Clients via another provider to whom they were introduced by Mr Valasakis, called Insch, upon which Mr Byam-Cook relied, but that evidence was exiguous and not supported by full disclosure and not realistically capable of being fairly tested by Mr Malek. In those circumstances the assessment would have resolved to an educated guess. My assessment would have been that trading by the Introduced Clients through Collins Stewart would have been at half the level at which it in fact took place.

Issue 2: Must Medsted give credit for sums that it would have been obliged to pay to sub-IBs had there been no breach of contract by Collins Stewart?

45. In dealing with Issue 10, which was whether or not Medsted was entitled to an order for damages to be assessed, and immediately after holding that Medsted was limited to nominal damages because of its breach of fiduciary duty, the Judge said this:

> 136. Had the court granted judgment for substantial damages to be assessed the assessment of Medsted's loss would have to take into account the sums payable to the sub-IBs by Medsted; otherwise the damages would be assessed in a greater sum that Medsted's actual loss. In circumstances where Medsted paid its sub-IBs "handsomely" the actual loss may in fact have been proved to be quite modest.

46. It is not, I think, obvious from that passage whether the Judge had in mind payments to independent sub-IBs, or had in mind also the payments out made to Mr Valasakis and Mr Dedetsinas.

47. This time it is Mr Malek who says that the issue has been decided already in his client's favour. He submits that, even though not recorded in the order made, Medsted could have appealed against this part of the judgment but did not do so. He submits that the point was fully argued before the Judge. He says that in all the circumstances there is an issue estoppel which prevents Medsted from rearguing the point, and/or that it would be an abuse of process to permit them to do so.

48. Mr Byam-Cook says in response that there is no issue estoppel here, essentially because what the Judge said was obiter and was not necessary to his decision. He characterises the Judge's paragraph 136 as a "throwaway remark".

49. The parties agree that the applicable principles are as follows.

50. ***Issue estoppel*** operates to bar a party from re-opening an issue in the same proceedings between the same parties insofar as "*a particular issue forming a necessary ingredient in a cause of action has been litigated and decided*", or where the party seeks to raise a point subsequently which it might have raised but did not raise at the time of the earlier determination: Arnold v National Westminster Bank plc [1991] 2 AC 93, 105E and 106B.

51. Issue estoppel will only operate in respect of an express determination of an issue identical to that which is now in dispute and which was necessary to the earlier substantive decision, and not merely collateral to it ("*which are fundamental to it and without which it cannot stand*"). Making the distinction between the fundamental and the collateral requires the Court to "*inquire with unrelenting severity*": In Re State of Norway's Application (No 2) [1990] 1 AC 723, 751-752.

52. One way of testing (albeit not a conclusive test) whether the determined issue was fundamental is to ask whether, given a right of appeal, the losing party could effectively appeal against the determination: Spencer Bower and Handley: Res Judicata 5th Edition, §8.25.

53. ***Abuse of process*** is not a substantive rule of law but a procedural rule based on the policy against abusive and duplicative litigation: Virgin Atlantic v Premium Aircraft [2014] AC 160, §17, §25. It arises from the Court's inherent power to protect against misuse of its own procedure in a manner which would be manifestly unfair or bring the administration of justice into disrepute, even if technically consistent with the rules: Hunter v Chief Constable of the West Midlands [1982] AC 529, 536C and 541B. An abuse of process may occur where a party mounts a "collateral attack" on a final decision of a competent court by seeking to raise an identical question to that which has already been decided (Hunter page 542B). The Court will engage in a "merits based" analysis of the facts to determine whether the relevant party's conduct is abusive of the court's process: Michael Wilson v Sinclair [2017] 1 WLR 2646, §48.

54. Applying those principles it seems to me clear that paragraph 136 is not a necessary ingredient in any part of the Judge's determination. He held that the Claimant was entitled to nominal damages only: the right approach to damages had they not been

nominal is logically irrelevant to that decision. It is obiter. As the terms of paragraph 136 make clear, the issue would only arise if there were an assessment of damages, and the Judge held that there should not be such an assessment. I think it is fairly characterised as an aside (though not as a throwaway remark). The paragraph does not set out the countervailing arguments, and the conclusion is explained only very briefly. Finally, if it had been a necessary part of any determination by the Judge it could only be characterised as having been part of his determination of Issue 10, and that was the Issue on which his decision was overruled by the Court of Appeal. So there is no issue estoppel.

55. It seems to me that if there is no issue estoppel I should be very hesitant indeed in finding an abuse of process. Given that a determination of the credit (if any) to be given for payments that would be made to sub-IBs was not captured by any of the 11 issues the Judge was asked to decide, and would in any event most naturally be regarded as being an issue of quantification which went to the quantification of damages rather than to question of liability, I cannot see that it is an abuse of process to argue a point in relation to which there is no issue estoppel.

56. I therefore need to decide Issue 2. I start from the position that great weight should be accorded to the view of Mr Justice Teare.

57. I shall begin with the facts.

58. Medsted justified its level of charging to Collins Stewart by telling Collins Stewart that it had to pay handsome levels of commission to sub-introducing brokers.

59. Exactly what the position was in practice is not entirely clear. The commission proposal given by Medsted to Collins Stewart alongside the Introducing Agreement, on 13 May 2009, indicated that Medsted usually paid 0.10% (the document actually shows a figure of 0.10% broken down as to 0.10% + 0.05%, so might in truth indicate 0.15%) to sub-IBs on commission rebates, and 3.7% on finance rebates. In other words it indicates that Medsted might pay out some 60% of the total commission received from Collins Stewart and around 82% of the total finance rebate.

60. Specific disclosure obtained shortly before the liability trial was accompanied by a letter from Medsted's solicitors listing sub-IBs and asserting that amongst the sub-IBs were Inverness Consultants Limited (a BVI company beneficially owned by Mr Valasakis) and Filicity Limited (a Cyprus company beneficially owned by Mr Dedetsinas). The letter also identified amongst the sub-IBs Mr Komninos, and a company, Rodolpho Holdings Limited, owned by him, and Karabalina Trading Limited, a Cyprus company represented by Mr Papagianakopoulos.

61. Collins Stewart has analysed the disclosure given by Medsted. That analysis shows that the total commission and financing rebate received from Collins Stewart (on non-hidden trading) from May 2009 to March 2011 was $1,011k, and of that sum $592k (about 60%) was paid out to Inverness and/or Filicity, and $389k (about 40%) to Karabalina, Rodolpho, or Mr Komninos. Of the $592k, I calculate the split to be 65% to Inverness and 35% to Filicity (and therefore very close indeed to the ratio of the ownership interests of Mr Valasakis and Mr Dedetsinas).

62. Mr Valasakis said at the liability trial that he and Mr Dedetsinas used Inverness and Filicity "to get more efficiently paid out of Medsted and that was the advice we were given by our accountants."

63. Medsted has given disclosure of some of its agreements with sub-IBs. The Medsted-Rodolpho agreement of 15 January 2008 stipulates that although Rodolpho's fee accrued within any month is payable within the first ten days of the following month, Medsted will not pay any fees or commissions unless it has previously received the payment due to it from Collins Stewart.

64. On the basis of the evidence available I find as a fact that:

    i) Medsted had a series of agreements with sub-IBs. Under those agreements, and in relation to business introduced by the relevant sub-IB, Medsted agreed to pay the sub-broker a fixed share of the monies it was entitled to receive from Collins Stewart in respect of those trades, but on terms that payment would not be made until monies were actually received by Medsted from Collins Stewart.

    ii) Neither Inverness nor Filicity were in any real sense sub-brokers: they were simply vehicles by which Mr Valasakis and Mr Dedetsinas received, on a 2:1 split in line with their respective ownership shares, the balance of monies received by Medsted left after the sub-IBs had been paid.

    iii) For non-hidden trading in the period May 2009 to March 2011, upon actual receipt, incoming monies from Collins Stewart were split 40% to true sub-IBs, 40% to Mr Valasakis (via Inverness) and 20% to Mr Dedetsinas (via Filicity).

65. I can now turn to the questions of principle.

66. Mr Malek for Collins Stewart submits that all payments out made to the sub-IBs, and to Filicity and Inverness, represent costs of the business carried on by Medsted, and that accordingly Medsted must give credit for them in the computation of its damages claim against Collins Stewart.

67. The position in relation to payments to Filicity and Inverness is straightforward. These are not in any sense costs of Medsted's business. The fact that these payments were made on receipts from non-hidden trading reflects simply the decision of the co-owners of Medsted to disburse the assets of Medsted to its owners rather than to leave the money in Medsted. I conclude therefore that no credit need be given by Medsted in relation to this category of payment.

68. The monies paid out to the sub-IBs do represent costs of Medsted's business. But it does not follow from that that Medsted must give credit for them. In a loss of profits claim a Claimant must of course give credit for monies he has saved: his claim is for loss of his profit, not loss of his revenue. Suppose for instance A agrees to by a machine from B at a price of £1,000. B would have spent £800 making the machine, but A cancels before any expenditure is incurred. B's claim is for £200. That is the income he was promised (£1,000), less his costs of earning that income. Or put another way his profit would have been £200, that is what he has lost, and so that is what he is entitled to by way of damages.

69. The critical question in this case, in relation to the sub-IBs, is therefore whether, as a result of Collins Stewart's breach, Medsted has made or will make savings which it must bring into account. Certainly Medsted has not yet paid anything to sub-IBs in respect of hidden trading. The question, it seems to me, is whether Medsted has, or will (if and when it receives damages) have a liability to its sub-IBs in relation to its receipts in respect of the hidden trading.

70. On that issue the evidential position is extremely unsatisfactory. Medsted's skeleton argument contends that it retains an exposure to Karabalina and Mr Komninos/Rodolpho. Medsted has called no witness evidence to support that contention, and has not, for instance, called Mr Valasakis to say that Medsted will pay out to its sub-brokers if and when it receives damages. On the other hand, it clearly did pay out to sub-brokers when it actually did receive monies from Collins Stewart in relation to non-hidden trading. Company searches carried out by Collins Stewart during the hearing before me show that Rodolpho was dissolved on 8 July 2020 and Karabalina was dissolved on 19 August 2015: but dissolved companies can be restored, and that might well happen if there were a prospect of a significant payment from Medsted.

71. Doing the best I can on the rather unsatisfactory state of the evidence it seems to me that I should assess damages on the basis that Medsted does retain a liability to its sub-IBs, and therefore the basic position is that no credit needs to be given, against its damages claim, on the basis that it will escape a liability to pay its sub-IBs.

72. There is however one wrinkle which arises in relation to the position of Mr Komninos and his associated companies. It arises from the fact that Mr Komninos and his associated companies have received from Collins Stewart, in relation to hidden trading, rebates totalling £214k. Mr Malek submitted that it would seem to be very unfair if Collins Stewart, who had already paid rebates to Mr Komninos and his associated companies, had to pay damages to Medsted which included sums to cover monies that Medsted would be liable to pay to Mr Komninos or his companies arising, in substance, in relation to the same underlying CFD trading. It would mean that damages were being assessed on a basis under which Mr Komninos was getting rebates directly from Collins Stewart in relation to the hidden trading, yet also getting a sum to reflect the rebates he did not at the time receive from Medsted on the same trading. I agree that such a result seems unfair and I suggested to the parties in the course of submissions a possible legal analysis which would prevent that result from arising. That analysis is as follows.

73. If Medsted, after it received damages form Collins Stewart, were to be sued by Mr Komninos or his associated companies for rebate due to the Komninos interests arising out of hidden trading, Medsted would be able to claim credit for the sums in fact already received by the Komninos interests, because, to that extent, Mr Komninos would not have suffered any loss. Accordingly, whatever liability Medsted would have had to the Komninos interests but for Collins Stewart's breaches of contract, has been reduced, as a consequence of those same breaches, by the amount that Collins Stewart in fact paid to the Komninos interests.

74. Neither party raised any reasoned objection to this analysis and in my judgment it reflects the correct approach to damages, and, happily, avoids the risk of the

Komninos interests being doubly remunerated at the expense of Collins Stewart, or Medsted receiving a windfall by receiving monies which it is not obliged to pay over to Mr Komninos.

75. I can therefore summarise my conclusions on the sub-IB issues as follows:

i) I am not bound by paragraph 136 of the liability judgment;

ii) There are no grounds upon which Medsted is required to give credit against its damages claim for sums that it would have paid out to Inverness or Filicity;

iii) Medsted must give credit, against its damages claim against Collins Stewart arising from hidden trading, for the sum of £214k which Collins Stewart paid to Mr Komninos in relation to the same hidden trading, because Medsted's liability to Mr Komninos and his associated companies has been reduced by the same amount;

iv) No other credit need be given by Medsted on the basis of savings made in relation to its liabilities to sub-IBs.

ISSUE 3: THE EXTENT OF HIDDEN TRADING

76. It is a surprising feature of the evidence that it is impossible now to determine in any detail the actual hidden CFD trading that took place. Despite the fact that Collins Stewart is a regulated entity, it is unable to provide direct documentary evidence of the CFD trading it carried out on behalf of the Introduced Clients. It can provide evidence of monies which it received from, and paid out to, Introduced Clients, but it does not have records of the trading in CFDs connected with those payments. The difficulties were explained by Mr Lovett at paragraphs 8 to 13 of his second witness statement and I accept his explanation of the difficulties.

77. Collins Stewart does however have records of the remuneration it received from the Introduced Clients. It has therefore attempted to use this data as a proxy for the overall level of trading, and to cross check it against information provided by its first tier providers. There were five first tier providers used by Collins Stewart, Commerzbank, Cheuvreux, IG Index, ADM, and Goldman Sachs. Collins Stewart has sought to obtain information from the first tier providers, and to combine this with its own records.

78. If and insofar as the amount of remuneration is known, and if it is known at what rate that remuneration was received, it is possible to calculate the extent of the trading that gave rise to that remuneration. And if the overall level of trading is known, it is then possible to calculate what remuneration would have been paid to Medsted had Medsted been paid at the rates agreed between Medsted and Collins Stewart.

79. In fact the back-calculation of actual hidden trading levels has not been carried out as a discrete stage in the process: instead Collins Stewart has calculated the actual remuneration it received on hidden trades, and adjusted this by the ratio between the level of remuneration it received and the level of remuneration that would have been payable to Medsted. An example makes the process easier to understand. Suppose that on a particular (hidden) transaction for the purchase of CFDs the commission in

fact received by Collins Stewart was due at a rate of 2.5%, and Collins Stewart in fact received £250. So if 2.5% was £250 the value of the transaction must have been £10,000. And if Medsted would have received 3.5% on the same transaction, it would have received £350 (3.5% of £100,000). In fact it is not necessary to calculate the underlying transaction size, it is possible to say simply that for every £1 in fact received by Collins Stewart, Medsted would have received £3.5/2.5. So if Collins Stewart in fact received £250, Medsted would have received £250 x 3.5/2.5, which is £350.

80. By applying this approach, which Collins Stewart calls a "recalibration", and which is set out at Appendix 8 to Mr Ballamy's report, Collins Stewart advances figures as follows, for total hidden CFD trading, expressed in GBP:

As in fact occurred:

Total commissions charged to Introduced Clients by CS:	£ 540k
Total finance charges charged to Introduced Clients by CS:	£ 1,049k
grand total	**£ 1,588k**

If the same trading been carried out but Medsted had been paid according to the terms of the Medsted/Collins Stewart contract:

Total commissions to Medsted	£ 368k
Total finance charges to Medsted	£ 2,109k
grand total	**£ 2,478k**

81. On Collins Stewart's figures the vast majority (probably over 95%) of the CFD trading was carried out on the following accounts KOMA-37 and KARNL-20 (both associated with Mr Komninos) and PANI-33, TANTO-49, or HARDA-01 (all associated with Mr Ioannis Panagiotopolous).

82. The accuracy and reliability of the results of the recalibration exercise depend on the reliability, accuracy, and completeness of the input data, and on the care and accuracy with which the calculations have been performed.

83. The calculations were carried out by Collins Stewart but then cross-checked, and audited against the underlying documentary evidence, by Mr Ballamy. He told me that the task he had performed was essentially a check of the task carried out by Mr Lovett's team, rather than taking information from different sources to provide an independent cross check of the conclusions reached.

84. The results of Mr Ballamy's checks were that some extremely minor (and certainly immaterial) adjustments were made to Collins Stewart's figures. I am entirely satisfied that the process of performing the calculations has been carried out with care and skill by the staff who worked under Mr Lovett's supervision and that the results of that exercise are accurate. But whilst the results may be accurate, they can be no

better than the data on which they are based, and so I must go on to consider a series of points made by Mr Byam-Cook by which he sought to undermine the result, either by attacking the assumptions on which it was based, or by suggesting that the underlying data was incomplete.

85. I accept the submission of Mr Byam-Cook that in assessing these points I must give Medsted a "fair wind" given that his clients, as Claimant, are limited to the obviously incomplete records that Collins Stewart are now able to provide as a basis from which the level of hidden trading is to be inferred. I direct myself in accordance with the analysis of Leggatt J (as he then was) in Marathon Asset Management LLP v Seddon [2017] EWHC 300 (Comm):

> 164. There are legal principles which may assist a claimant who has difficulty in proving loss. One such principle is that difficulty of estimation should not be allowed to deprive the claimant of a remedy, particularly where that difficulty is itself a result of the defendant's wrongdoing. Accordingly, the court will attempt as best it can to quantify the claimant's loss even where precise calculation is impossible. The court may do so by making reasonable assumptions about what the claimant's financial position would have been if the defendant had complied with its obligation to the claimant. A second principle is that, where the defendant has destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court will make presumptions in favour of the claimant. The classic illustration of this principle is the old case of *Armory v Delamirie (1722) 1 Strange 505; 93 ER 664*, where a chimney sweeper's boy found a jewel and took it to the defendant's shop to find out what it was. The defendant did not return the jewel but only the empty socket, and was held liable to pay damages to the boy. Experts gave evidence about the value of the jewel which the socket could have accommodated. According to the case report:
>
> > 'The Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.'
>
> 165. These principles can help a claimant to overcome evidential difficulties in proving damages. There is a limit, however, to how far they can be taken. They may assist in resolving uncertainties where evidence is not reasonably available but they do not enable the court to conjure facts out of the air and they have little role to play where evidence could reasonably have been obtained, or has in fact been adduced. They may give the claimant a fair wind, but not a free ride.

86. I accordingly approach Mr Byam-Cook's points on the basis that I should give a fair wind but not a free ride.

87. Mr Byam-Cook had two big points each of which, if correct, would require very considerable adjustment to Collins Stewart's figures.

88. The first was an all-out attack on the premise of the calculations that essentially all hidden trading had now been revealed. It was based solely on the minutes of a meeting that took place on 6 October 2011, so when hidden trading had been going on for over a year. The minutes are minutes of Collins Stewart's credit committee. Those present included Mr Lovett and Mr Martel, CFO for the wealth management division. The context of the relevant passage is a discussion of the level of CFD trading and, therefore, the extent to which Collins Stewart was exposed to the first tier providers. Collins Stewart could of course reduce its own risk by increasing the margin that its clients were required to provide. The text of the relevant minute is as follows:

> **10) CFD Collateral Percentages Review**
>
> 10.1 The total CFD exposure has reduced over time and now stands at £15m. GL has been in regular contact with those clients holding Flexopack, Globus Maritime & Velti positions and exposure has significantly reduced as a result.
>
> 10.2 KOMA-37 is transferring some of their Velti position into a separate account at CSCI and will fund this with £570k in additional funds. GL highlighted these accounts had provided CSWM with approximately £2m of revenue thus far.
>
> FAYET20 has been requested to provide funds to cover a margin call.
>
> 10.3 In light of the volatile economic &market backdrop it was agreed to amend the CFD margin requirements as follows:
>
> Elinoil/Flexopack/Globus Maritime to be increased to 100% in light of recent trading volumes that suggested it would take several weeks to sell down the entire holdings.
>
> Iktinos Hellas to remain at 35% as the holding can be liquidated within a day.
>
> Kyriakoulis to be increased from 35% to 100% as it is a private company.
>
> Velti to be decreased from 50% to 40% as liquidity remains strong.
>
> 10.4 It was agreed that GL would advise each client of the revised margin requirements. GL noted that the client's Swiss Bank is offering CFDs for Flexopack at 40% margin and, as a

> result of our new requirements, the CFDs may be transferred away from CSCI. Other Committee members acknowledged this risk but felt a more prudent approach at this time was called for.

89. Mr Byam-Cook submits that the plain reading of the passage at paragraph 10.2 is that Mr Lovett was saying that trading on the KOMA-37 account alone had produced approximately £2m of revenue to date. That, he said, showed that the Collins Stewart figures, showing revenue on that account of only around £1m, must be grossly understated.

90. In his witness statement for this hearing Mr Lovett said that he made the comment about £2m of profit "to counter the general tone of negativity concerning CFD accounts, which were seen by the committee as a credit risk. I made the comment off the cuff in the meeting, without checking the figures." He explained that during this period Collins Stewart was writing CFD business not only for Mr Komninos, and the other Introduced Clients, but also for some other clients who had not been introduced by Medsted.

91. When cross-examined during this hearing Mr Lovett accepted that this agenda item had been for him to deal with, and he agreed that the other two figures that he gave in paragraph 10 of the minutes were accurate and had been researched by him in advance. He said, of the passage at 10.2, that he was "very very aware that I was referring to CFDs in general, and that we had earned approximately £2million of revenue from the CFD business."

92. Mr Byam-Cook noted that during the liability trial Mr Lovett had first said that the overall revenue that Collins Stewart had earnt in the total history of CFDs was just less than £1m, but had gone on to suggest that perhaps the £2m figure was a total figure for earnings on the KOMA 37 account (rather than just on CFDs).

93. In my judgment Mr Lovett can no longer remember either what he said at that meeting, nor what he might have meant to say. He has fallen into the common trap of reconstructing what he thinks he might have said rather than remembering what he did say, or why. I note that Mr Justice Teare's view of Mr Lovett's evidence at the liability trial was that in some respects he was seeking to justify Collins Stewart's case rather than to remember what actually happened, and I share that view.

94. So I consider it preferable to approach this issue on the basis of the contemporaneous documents.

95. The minutes themselves might be read as Mr Byam-Cook suggests, or might be read as referring to the accounts of all those clients who hold Flexopack, Maritime and Velti positions. And the minutes might not be entirely accurate: they are certainly unlikely to have been drafted with the care that goes into formal legal documents. I think that I can safely infer from the context that Mr Lovett might have been wanting to play up the revenue consequences of the CFD trading with which he was involved.

96. Mr Malek submits that the likely explanation for the £2m figure is that it is revenue from CFD clients across the board. He points out that clients known as D R and E

accounted for about £500k of CFD revenue, and if that is added to the total revenue from the Medsted clients the figure is roughly £2m.

97. In my judgment the minutes do not support a conclusion on the balance of probabilities that CFD trading with Mr Komninos alone brought £2m worth of revenue to Collins Stewart. Such a conclusion would entail a finding that the Lovett/Ballamy exercise, which is based on contemporaneous documents, had grossly underestimated trading on account KOMA 37, and I do not consider that to be at all likely. A much more likely explanation of what is recorded in the minutes is that what was said was in fact a reference to overall levels of revenue on CFD trading.

98. The next big point taken by Mr Byam-Cook was a suggestion that the assumed rates of finance charge earned by Collins Stewart on CFDs written by Commerzbank and Cheuvreux were not, respectively, 2.35% and 2.5%, but were in fact only 1%. If that were so, it would mean that the level of trading at Commerzbank and Cheuvreux to be inferred from the level of rebate received, was 2.35 or 2.5 times higher than the figures advanced by Collins Stewart.

99. Mr Malek complained, with some justification, that the finance rates charged by Commerzbank and Cheuvreux had been pleaded by Collins Stewart and not specifically been put in dispute, and that Collins Stewart had had no warning that this point would be taken against them.

100. The foundation of Mr Byam-Cook's suggestion that the finance rates received by Collins Stewart were in fact only 1% was answers given by Mr Lovett in cross-examination and evidence given at the liability trial. Mr Lovett was shown that Mr Jouan had said at the liability trial that Canaccord's normal finance rate for CFD trading was 1%, and that Mr Glover had said at the liability trial that Collins Stewart's rates were no higher for hidden trading. When then asked whether he thought the 1% rate would have applied to hidden trading, Mr Lovett said "Yes, as far as I'm aware".

101. Then Mr Lovett was reminded of his second witness statement, prepared this hearing. In that he says that the charge to clients for CFD trading at Commerzbank was 2.35% and at Cheuvreux was 2.5%. He said he thought the difference might be the difference between the total charged to the client and the proportion kept by Collins Stewart.

102. Again I find Mr Lovett's evidence, given on the basis of his recollection, to be of little weight. But I think there are two points which strongly support the contention that Collins Stewart charged 2.35% and 2.5% on trading through Commerzbank and Cheuvreux.

103. First, it is common ground between the parties that for hidden trading on account KOMA-37 (with Mr Komninos) rebate received by Collins Stewart was split 50/50 with Mr Komninos' company Magestic, so that if the headline rate of rebate was 2.35% and 2.5%, Collins Stewart would only retain 1.175% or 1.25% - very much closer to the "normal" rate of 1%.

104. Secondly, and in my view determinatively on this issue (albeit only on the balance of probabilities), Collins Stewart's disclosure includes contemporaneous monthly calculation sheets from December 2010 and December 2011. These are the sheets that were used by Canaccord's middle office to calculate charges due in relation to

Commerzbank and Cheuvreux trading. They show clearly that the rate used for calculations was 2.35% for Commerzbank and 2.5% for Cheuvreux.

105. Accordingly I reject Mr Byam-Cook's second suggested basis for wholesale variation of the Defendant's figures.

106. The next point taken by Mr Byam-Cook was that Mr Lovett's analysis made no allowance for CFD trading placed by Collins Stewart with Goldman Sachs. The amounts in issue here are modest in the context of this case, and I will therefore take this point briefly. There is clear evidence that some limited trading was performed with Goldman Sachs, but it seems likely that Collins Stewart did not charge their clients in relation to this trading. That, in itself, is irrelevant in my view: if Introduced Clients did trade, Medsted is entitled to the commission that would have been paid had that trading been disclosed and accounted for. Mr Ballamy's short supplementary post-hearing report analysed the records for the transactions on the only two accounts for which there are contemporaneous records evidencing trading at Goldman Sachs. He has calculated the commission that would have been payable to Medsted as £125,434, or possibly £158 higher if slightly different commission rates are used on one of the transactions. Medsted agrees those calculations subject to some very minor adjustments and I assess the commission that would have been earned by Medsted at £126,000. I reject the suggestion that I should infer that there was a third account on which there was Goldman Sachs trading: there is no contemporaneous evidence to support that inference. I also reject Mr Malek's submission that no damages should be awarded because Collins Stewart did not themselves charge any commission to their clients in respect of trading at Goldman Sachs. That is irrelevant because what Collins Stewart charged its clients was a matter for them and did not affect their liability to Medsted.

107. There are some minor points raised by Mr Byam-Cook that I can deal with briefly.

i) I am satisfied that deliberately hidden trading began only in or about April 2010. There is evidence of a week's trading that took place in January 2010 and which was not disclosed to Medsted but I am satisfied that that was an oversight. It is inherently unlikely that trading would have been deliberately concealed before the time that the clients began to complain about the levels of commission that Medsted was receiving. This missed January trading is included in the calculations. Because it was overlooked rather than deliberately hidden there is no basis to infer from it that there are other instances from around that time of further hidden trading.

ii) I reject the suggestion that there is further client, Mr Koutsoulioutsos, for whom Collins Stewart carried out hidden CFD trading. It is true that a Z-coded account was set up for him, and Collins Stewart accept that Z was a code prefix used for accounts that were to be concealed from Medsted. But if there had been trading I consider it likely that it would have left some trace (as has CFD trading on all the other Z accounts), and I am prepared to accept Collins Stewart's explanation that although an account was set up, no CFD trading was in fact carried out.

108. Mr Byam-Cook did not in his closing submissions contend for any further specific adjustments to the Lovett/Ballamy figures, but he did invite me to consider an overall adjustment to reflect the inherent uncertainties in that exercise, and the fact that it was almost bound to be an underestimate of the true figure. I do not, however, consider it is right for me to make any such adjustment. I can see no sound basis upon which I could assess what the quantum of any such adjustment would be. Especially in circumstances where the Claimant has chosen not to adduce its own forensic accountant's analysis, and advances no reasoned argument in support of any particular adjustment, I think that to make such an adjustment would be to stray into guesswork unsupported by any evidence.

109. Finally there was some hidden trading on other products, but the parties were ultimately agreed that the only such products were equities and FX. Mr Ballamy's calculation of Medsted's lost earning was £53k on equities and £36k on FX making £89k in all. Medsted urged a "rounding up" to £65k and £50k but I reject this on the same basis as I reject a general rounding up of the figures for CFD trading.

110. I should say for completeness that I understood the parties to agree that, on this approach to the quantification of damage, I have no need to resolve the minor dispute between them as to what would be reasonable rates of client charges on CFD trading.

Conclusion on hidden trading

111. I can now attempt to collate the figures. I will round them to the nearest 1000.

112. Mr Ballamy's total figures for the fees that would have been payable to Medsted on the hidden CFD trading were:

Commission: €97k + £202k + $126k

Finance rebate: €735k + £939k + $829k

113. For the reasons I have given I accept those figures and make no adjustment to them other than the addition of £126k in respect of Goldman Sachs trading.

114. Finally there is the further £89k earned by Collins Stewart for non-CFD hidden trading, split as to £53k equities and £36k FX. But these figures are the earnings of Collins Stewart, and I must decide what proportion of that sum would have found its way to Medsted. The parties agreed that I should award a proportionate share of that sum, based on the expert's views of a what a reasonable rate would be. The parties' experts agreed a range of 20-30% of the commission for equities trading and 30% to 60% of the total mark up for FX transactions. Taking into account that the levels of business are low (and the experts agreed that that will tend to push up the rates) I assess the appropriate rates as 25% and 50% respectively. That means that the sums payable to Medsted are £13k and £18k respectively making £31k.

Overall conclusion

115. I therefore assess the damages payable by Collins Stewart to Medsted in the sums set out at paragraphs 112, 113 and 114, less the figure of £214k representing the amount

paid by Collins Stewart to Mr Komninos. I calculate the totals to be €832k, £1,084k and $955k.

116. I heard no argument on interest nor on the currency or currencies in which the judgment should be expressed and if these matters cannot be agreed I will hear further argument on them.